

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

01/18/2002

CLERK OF THE COURT  
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza  
Deputy

LC 2001-000391

FILED: \_\_\_\_\_

BRET ADAM DEJEET

JAMES T VANBERGEN

v.

STATE OF ARIZONA

B DON TAYLOR

DISPOSITION CLERK-CCC  
PHX MUNICIPAL CT  
REMAND DESK CR-CCC

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. #5919370

Charge: 1) DUI ALCOHOL  
2) DUI W/BAC .10 OR ABOVE

DOB: 07/15/75

DOC: 05/12/00

This Court has jurisdiction of this appeal by the State pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

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This matter has been under advisement since the time of Oral Argument on December 19, 2001. This decision is made within 30 days as required by Rule 9.8, Maricopa County Superior Court Local Rules of Practice. This Court has considered the record of the proceedings from the Phoenix City Court, and the Memoranda and arguments from counsel.

This appeal by the State raises only one issue: whether the trial judge (the Hon. Cynthia Certa) erred in granting the Defendant's handwritten Motion in Limine which was filed on the date of trial and requested that the State be precluded from introducing any evidence of an HGN test<sup>1</sup> quantifying Appellee's blood alcohol content at the time of driving. In granting the motion on April 18, 2001 the trial court acknowledged that Appellee intended to raise an affirmative defense and had no intention of challenging the accuracy of the State's evidence regarding Appellee's blood alcohol content at the time a breath or blood test was administered. The trial judge cited and relied upon State v. Cannon.<sup>2</sup>

The Arizona Supreme Court has stated that "(HGN test results are) not admissible in any criminal case as direct independent evidence to quantify blood alcohol content."<sup>3</sup> However, HGN test results may be admitted, not as independent evidence but to corroborate or attack the chemical analysis or other evidence of the Defendant's blood alcohol content.<sup>4</sup>

In State v. Cannon<sup>5</sup>, the Arizona Court of Appeals affirmed the trial judge's directed verdict on a charge of Aggravated Driving with an Alcohol Concentration of .10 or Greater. It is critical to the Cannon opinion that the Court of Appeals relied upon the fact that Cannon's blood alcohol concentration was

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<sup>1</sup> Horizontal Gaze Nystagmus test.

<sup>2</sup> 192 Ariz. 236, 963 P.2d 315 (App.1998).

<sup>3</sup> State v. Superior Court (Blake), 149 Ariz. 269, 280, 718 P.2d 171, 182 (1986); as cited in State v. Cannon, 192 Ariz. at 239, 963 P.2d at 318.

<sup>4</sup> Id.

<sup>5</sup> Id.

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measured approximately 45 minutes after his driving had occurred. The State's expert was not able to perform a retrograde analysis to describe the specific blood alcohol content of Cannon at the time of his driving.

Certainly, the trial judge was correct in accepting defense counsel's avowal, in the context of a Motion in Limine, that evidence justifying the affirmative defense of A.R.S. Section 28-692(B) would be produced. However, with no evidence or information or avowal by the State as to their ability to perform a retrograde analysis and relate the blood alcohol content test results to the time of Appellee's driving, the trial court erred. This missing piece of information is critical: a retrograde analysis quantifying Appellee's blood alcohol content at the time of driving would clearly render HGN test results corroborating evidence and not independent evidence of Appellee's blood alcohol content at the time of driving.

For all of the reasons cited above,

IT IS ORDERED reversing the trial court's order which granted Appellee's Motion in Limine.

IT IS FURTHER ORDERED remanding this case back to the trial court for a new oral argument, or an evidentiary hearing on Appellee's Motion in Limine consistent with this opinion.